

Article 102 TFEU: Modern Enforcement and the Commission's Guidance Paper

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Article 102 TFEU: Modern Enforcement and the Commission's Guidance Paper

STRUCTURE OF PRESENTATION

- INTRODUCTORY COMMENTS ABOUT ARTICLE 102
- BRIEF DISCUSSION OF MARKET DEFINITION AND MARKET POWER
- ABUSE
 - WHAT IS THE PURPOSE OF ARTICLE 102?
 - THE 'REFORM' OF ARTICLE 102
 - THE EUROPEAN COMMISSION'S *GUIDANCE ON ARTICLE 102 ENFORCEMENT PRIORITIES*
 - THE MOVE TOWARDS A 'CONSUMER WELFARE' STANDARD
 - THE PROTECTION OF COMPETITION, NOT CONSUMERS
- CONCLUSIONS

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INTRODUCTORY COMMENTS

- ARTICLE 102 APPLIES TO THE *UNILATERAL BEHAVIOUR* OF A DOMINANT FIRM
- IT CAN ALSO APPLY TO THE BEHAVIOUR OF *COLLECTIVELY DOMINANT* FIRMS, THOUGH THIS HAS BEEN RELATIVELY LITTLE EXPLORED – MOST CASES ON COLLECTIVE DOMINANCE OR 'TACIT COLLUSION' HAVE ARISEN UNDER MERGER CONTROL RATHER THAN ARTICLE 102

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MARKET DEFINITION AND MARKET POWER

- MARKET DEFINITION IS AN ESSENTIAL STARTING POINT IN ANY ARTICLE 102 CASE: SEE THE COURT OF JUSTICE IN *CONTINENTAL CAN V COMMISSION* (1973)
- HOWEVER MARKET DEFINITION IS A TOOL: ULTIMATELY THE QUESTION TO BE DETERMINED IS WHETHER A FIRM HAS SIGNIFICANT MARKET POWER ('A DOMINANT POSITION')
- DOMINANCE IS A BINARY CONCEPT – EITHER YOU HAVE IT OR YOU DO NOT

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MARKET DEFINITION AND MARKET POWER

- MARKET SHARE FIGURES CAN BE ASCRIBED TO FIRMS *WITHIN* THE RELEVANT MARKET: DOMINANCE IS ASSUMED AT A MARKET SHARE OF 50% OR MORE, *BUT THIS IS REBUTTABLE*
- MARKET SHARES TELL US *NOTHING* ABOUT *POTENTIAL ENTRANTS* – NOTE THE SIGNIFICANCE OF BARRIERS TO ENTRY
- AND MARKET SHARES TELL US NOTHING ABOUT *BUYER POWER*

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ABUSE

- TEXTBOOKS TEND TO DIVIDE ABUSE INTO 'EXPLOITATIVE' AND 'EXCLUSIONARY' ABUSES
- SOME CASES ARE CONCERNED WITH *EXPLOITATION* – FOR EXAMPLE CHARGING HIGH PRICES, DISCRIMINATION, INEFFICIENCY. *THESE CASES ARE RARE*
- AND NOTE THAT SOMETIMES CHARGING HIGH PRICES MAY ACTUALLY BE *EXCLUSIONARY* WHEN THEY ARE, IN EFFECT, A REFUSAL TO SUPPLY

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ABUSE

- MOST CASES ARE CONCERNED WITH *EXCLUSIONARY* ABUSES. EXAMPLES ARE
 - LONG-TERM EXCLUSIVE AGREEMENTS AND/OR CONDITIONAL REBATES
 - 'TIE-INS' AND BUNDLING

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ABUSE

- FURTHER EXAMPLES OF ABUSE
 - PREDATORY PRICING
 - REFUSALS TO SUPPLY
- NOTE THAT THIS LIST IS NOT EXHAUSTIVE (SEE EG *ASTRAZENECA*)

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ABUSE

- **BUT WHAT DO WE MEAN BY AN EXCLUSIONARY ABUSE? MORE FUNDAMENTALLY, WHAT IS THE PURPOSE OF ARTICLE 102?**
 - TO KEEP MARKETS OPEN AND PROTECT ECONOMIC FREEDOM?
 - TO ACHIEVE FAIRNESS?
 - TO PREVENT UNDUE DISCRIMINATION?
 - TO PROTECT THE SINGLE MARKET?
 - TO PROTECT COMPETITORS?
 - TO PROTECT THE PROCESS OF COMPETITION?
 - TO PROTECT CONSUMER WELFARE?

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ABUSE

- **A DIFFERENT ISSUE: WHATEVER THE PURPOSE OF ARTICLE 102, IS IT POSSIBLE TO DEVISE ADMINISTRATABLE RULES, CAPABLE OF APPLICATION BY BUSINESSES, ADVISERS, COMPETITION AUTHORITIES AND COURTS?**
- **AND SHOULD WE BE MORE WORRIED ABOUT FALSE POSITIVES OR FALSE NEGATIVES?**

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ABUSE

- AN ADDED CONCERN: THE US FEDERAL COURTS HAVE 'SHRUNK' THE SCOPE OF SECTION 2 OF THE SHERMAN ACT OVER MANY YEARS (SEE RECENTLY *TRINKO*, *LINKLINE*)
- PRACTICES THAT WOULD BE LEGAL IN THE US CAN BE ILLEGAL IN THE EU (REFUSAL TO SUPPLY, MARGIN SQUEEZE, PREDATORY PRICING)

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ABUSE

- THE US IS MORE WORRIED ABOUT FALSE POSITIVES THAN FALSE NEGATIVES
- IS THE EU THE OTHER WAY AROUND?

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- IN THE 1990s AND 2000s MUCH OF EU COMPETITION LAW WAS REFORMED, AND A 'MORE ECONOMIC APPROACH' WAS TAKEN
 - VERTICALS REFORM UNDER ARTICLE 101
 - EUMR REFORM AND GUIDELINES ON HORIZONTAL AND NON-HORIZONTAL MERGERS
 - TECHNOLOGY TRANSFER GUIDELINES, HORIZONTAL COOPERATION AGREEMENTS ETC.

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- ARTICLE 102 CANNOT BE 'REFORMED' IN THE SAME WAY AS OTHER ASPECTS OF COMPETITION LAW, SINCE THERE IS NO DELEGATED LEGISLATION: THE LAW IS WHAT THE EU COURTS SAY IT IS
- THE CASE-LAW ON ARTICLE 102 CONTAINS MANY 'RULES' OF A FORMALISTIC, 'PER SE' NATURE
- ECONOMIC INSIGHTS HAVE SHOWN THAT SOME OF THESE RULES MAY BE PERVERSE

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- THE EUROPEAN COMMISSION CANNOT 'UNSAY' THE JURISPRUDENCE OF THE EU COURTS BY WRITING GUIDELINES THAT ARE INCONSISTENT WITH IT
- THE COMMISSION INITIATED A REVIEW OF THE LAW ARTICLE 102 IN 2004
- A WIDE-RANGING DEBATE FOLLOWED

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ABUSE

- THIS CULMINATED IN THE COMMISSION'S *GUIDANCE ON ENFORCEMENT PRIORITIES IN RELATION TO EXCLUSIONARY ABUSES OF 2009*
- NOTE: *GUIDANCE NOT GUIDELINES*
- THE *GUIDANCE* DOES NOT ALWAYS FOLLOW THE LAW: WHERE DOES THIS LEAVE A COURT THAT IS HEARING AN ARTICLE 102 CASE?

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- THE COMMISSION CONSISTENTLY SAYS THAT THE PURPOSE OF THE COMPETITION RULES IS TO PROMOTE CONSUMER WELFARE
- IT SPECIFICALLY SAYS THAT ARTICLE 102 PROTECTS THE PROCESS OF COMPETITION, NOT COMPETITORS
- AND THAT ARTICLE 102 IS PREDOMINANTLY ABOUT PROTECTING 'AS EFFICIENT' COMPETITORS, NOT LESS EFFICIENT COMPETITORS

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ABUSE

- IN THE CASE OF PRICING ABUSES, THIS INVOLVES EXAMINING THE PRACTICES OF THE DOMINANT UNDERTAKING AGAINST AN APPROPRIATE MEASURE OF COST
- SEE PARAGRAPHS 23-27 ON AVERAGE AVOIDABLE COST AND LONG-RUN AVERAGE INCREMENTAL COST

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CONCLUSIONS

- THE TREND OF COMPETITION LAW ENFORCEMENT IS TOWARDS AN EFFECTS-BASED STANDARD
- UNILATERAL CONDUCT IS TOO COMPLEX TO BE DEALT WITH BY PER SE OR FORMAL RULES
- A FORMALISTIC APPROACH LEADS TO FALSE POSITIVES

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CONCLUSIONS

- THE GUIDANCE DOES NOT STATE THE LAW; BUT IT CAN HELP TO SHAPE THE LAW
- LET'S REVIEW THE POSITION IN 2021!

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